85-853

No. .....

U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

RAY McCLAIN,
Petitioner,

vs.

EDWARD JOHN WALKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment to the United States Constitution requires the appointment of counsel to indigent defendants who have been cited for contempt in a civil contempt proceeding brought by a private party to enforce a child support obligation.

2. Whether the Fourteenth Amendment to the United States Constitution requires the appointment of counsel to indigent defendants in the above-mentioned situation.

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Fourteenth Amendment 2

No. .....

In the
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RAY McCLAIN,
Petitioner,

v.

EDWARD JOHN WALKER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ray McLain, Sheriff of Lincoln County, State of Oklahoma, by the District Attorney of Lincoln County, Walter W. Roberson, by S. Paul Richards, Assistant District Attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINION BELOW

The decision of the United States Court of Appeals for for the Tenth Circuit from which the writ of certiorari is sought was rendered in the case of Edward John Walker, petitioner, versus Ray McLain, Sheriff of Lincoln County, Oklahoma, respondent, in Case No. 84-1886. This opinion was filed on July 25, 1985 and reported at 768 F.2d 1181.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 19, 1982, Edward John Walker, respondent, was divorced from his wife in Lincoln County, State of Oklahoma. In that proceeding, during which respondent was represented by counsel, he was ordered to pay Sixty Dollars ($60.00) per month child support for each of his two (2) minor children. At the time of the divorce, respondent was receiving Social Security disability payments to himself. In addition, respondent's children were receiving Social Security benefits in the amount of Three hundred and eighty dollars ($380.00) for both children. Since that divorce decree was rendered in August of 1982, respondent's children continued to receive the Social Security disability payments, which are made by the Federal Government and paid directly to respondent's ex-wife in behalf of said minor children. Respondent himself has not voluntarily paid one penny in child support for either of his minor children since the divorce decree was rendered. The only monies collected from respondent for child support have been insignificant sums obtained through garnishment proceedings.

Respondent's ex-wife went to court on three (3) separate occasions to attempt to compel respondent to comply with the order of the court regarding child support. At the first hearing on January 5, 1983, the trial court adjudged petitioner not guilty of contempt for failure to pay child support, but did reduce the arrearage to judgment. At the second hearing, held September 7, 1983, the trial court heard extensive evidence concerning business transactions that petitioner had engaged in. The trial court heard evidence that petitioner owned an oil royalty interest which

appeared to be producing income sufficient to pay the court-ordered child support. At that hearing, evidence was also admitted that respondent had sold certain property for Thirty-eight thousand dollars ($38,000.00), without respondent ever specifying how much was owed on that property. At this hearing, the trial court found that the respondent was in contempt of court for his wilful failure to pay child support. Again, the court reduced the arrearage to judgment and specified a means by which the respondent could purge himself of contempt. The trial court also advised petitioner of his right to request a modification of the child support ordered in the divorce decree and also of his right to contact the Legal Aid Office for possible legal assistance in requesting such relief.

Finally, at the third hearing on February 15, 1984, respondent's ex-wife sought to have respondent sentenced, based upon the previous finding of contempt at the September, 1983 hearing. At the February 1, 1984 hearing, the trial court heard evidence that respondent had transferred his oil royalty interest to a relative, the court finding that this was a wilful attempt to circumvent the orders of the court. At this hearing the trial court again found respondent in contempt for his wilful failure to pay child support and sentenced him to ninety (90) days in the county jail. The trial court also provided that respondent could free himself by paying One Thousand Dollars ($1,000.00) towards child support to purge the contempt. Even then, respondent was allowed two (2) days to report to the county jail.

Respondent was not advised at either the September 1983 hearing or the February, 1984 hearing of any right

to court-appointed counsel in the case of indigency. The record does reflect, according to the trial court judge, that respondent was advised at or before both proceedings of his right to be represented by an attorney if he so desired. Respondent was also advised of his right to seek modification of the original child support order. Since the original divorce decree in August, 1982, respondent has never paid any child support. He has not asked the court to modify child support after contempt was sought.

Respondent thereafter sought a writ of habeas corpus in the Supreme Court of the State of Oklahoma. That court, after hearing oral arguments, refused to issue the writ or to assume original jurisdiction with regard to a temporary stay. The court found, in an order entered March 28, 1984, that in the September 1983 hearing, at which respondent was found in indirect contempt of court, he had been advised of his right to an attorney, and had waived that right in open court. It was further found by the court that respondent had been advised that he could seek modification of the child support order, but that until the same was modified, the support order remained in effect. Finally, the court found that respondent was advised that he could seek attorney representation through Legal Aid. *See* Appendix A.

Thereafter respondent sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. That court, in an Opinion and Order filed May 23, 1984, denied the relief sought, finding that an indigent parent does not have a constitutional right to the appointment of counsel in connection with a civil contempt hearing arising out of non-payment of obligations under a support order. *See* Appendix B.

After respondent's Motion to Alter or Amend Judgment was denied, respondent appealed to the United States Court of Appeals for the Tenth Circuit. That court, after hearing oral argument, found that a civil contempt defendant who faces possible incarceration is entitled to the appointment of counsel, in the event of indigency. The court therefore reversed the lower court and ordered it to grant respondent's request for relief and vacate the State Court's finding of civil contempt. That court's order was filed July 25, 1985. It is from this ruling that petitioner seeks review.

REASONS FOR GRANTING THE WRIT

I.

THE PROCEEDING IN WHICH PETITIONER WAS INCARCERATED WAS A CIVIL PROCEEDING NOT IMPLICATING THE RIGHT TO COUNSEL REQUIREMENTS OF THE SIXTH AMENDMENT.

There is no question about the trend of modern cases to extend the right to counsel in criminal trials. It is true that this fundamental right, which was enunciated in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and extended in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1971), has been determined to exist for all *criminal* defendants in which there is the possibility of incarceration, as well as juveniles who are charged with crimes, *In re Gault*, 387 U.S. 1 (1966). This right to counsel has been determined to exist by the United States Supreme Court in order to give life to the provisions of the Sixth Amendment of the United States Constitution and these rights have been applied to the states through the Fourteenth Amendment to the United

States Constitution. However, as pointed out by the Federal District Court below in its May 23rd opinion and order, there is no controlling federal authority which has extended this right to civil defendants in general, or to civil contemnors in particular.

While respondent attempts to avoid making distinctions between whether a proceeding is civil or criminal, such a distinction is essential if the courts are to comply with the constitution on the one hand and avoid judicial legislating on the other hand. Was respondent's contempt hearing, then, a civil or a criminal proceeding?

Respondent was brought into court by his divorced ex-wife, a private party. The State was not a party either to the original divorce proceeding or to any of the contempt hearings arising out of that divorce decree. The contempt proceeding itself was brought by the ex-wife in her effort to compel the petitioner to comply with the state trial court's order of child support issued out of the divorce action. Thus the contempt proceedings, including those in September of 1983, and February of 1984, were both efforts on the part of a private party to request the court to impose sanctions on a party wilfully failing to comply with the court's previous order. Any payment made by the respondent would have gone directly to his ex-wife on behalf of her minor children. When the state trial court finally ordered the respondent to jail for contempt of court and failing to pay the court-ordered child support, he was still given the option of purging that contempt of court by immediately making installment payments on the outstanding support due.

Indeed, it is precisely this conditional nature of the jail sentence that distinguishes it from criminal cases. It is apparent that the state trial judge's purpose was to coerce respondent to comply with the court's order. As the Supreme Court noted in *Shillitani* v. *United States*, 384 U.S. 364 (1966):

> "While any imprisonment, of course, has punitive and deterrent effects it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify. See Nye v. United States, 313 US 33, 42-43, 85 L. Ed. 1172, 1177, 61 S Ct. 810 (1941). The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?"

Throughout these proceedings, respondent was advised of his right to have counsel (admittedly respondent was not advised of any right to court appointed-counsel in the case of indigency) and of his right to seek assistance through the Legal Aid office. Taking all these facts together, it appears clear that the contempt proceeding in February of 1984, out of which respondent was sentenced to ninety (90) days in the county jail, was a civil proceeding affording a civil remedy to a private party by means of the sanction of the court imposed for failure to comply with a court order rendered in a private, civil dispute. In this case, even more than in *State ex rel. Department of Human Services* v. *Rael*, 642 P.2d 1099 (N.M., 1982), cited by the Federal District Court below, it appears obvious that the proceeding in the state trial court below was a civil proceeding for the purposes of right-to-counsel analysis of the Sixth Amendment.

Although respondent argued that it matters not whether the proceeding was civil or crminal, a fair reading of *Gid-*

eon, In re Gault and *Argersinger*, supra, all revolve within the context of the criminal justice system and criminal proceedings. All of those decisions are predicated upon the adversarial system involving the state as prosecuting authority against a criminal defendant, whether the criminal defendant be adult or juvenile. It is indeed this imbalance, or perceived imbalance, between the power and resources of a case handled on the one side by the state and its officers, and on the other side by an unrepresented criminal defendant, that appears to have mandated the requirement of court-appointed counsel in criminal cases. There is nothing in those decisions, other than obiter dicta at best, that would justify an extension of this precedent to civil proceedings of the type involved in the case before this Court. The only authority cited by respondent for extending right to court-appointed counsel to civil cases of this type are two Federal District Court cases arising out of Ohio in 1981: *Young* v. *Whitworth*, 522 F.Supp. 759 (S.D. Ohio, W.D. 1981) and *Mastin* v. *Felleroff*, 526 F.Supp. 969 (S.D. Ohio W.D. 1981), as well as a later Federal District Court case out of Michigan, *Cobb* v. *Green*, 574 F.Supp. 256 (W.D. Mich., 1983). Obviously, these three Federal District Court decisions are not binding on this Court or on the Federal District Court below, and the reasoning in these decisions is insufficient for this Court to find that both the Federal District Court below, the state trial court below and the state appellate court were all in error in concluding that the petitioner had no right to court-appointed counsel in a civil contempt proceeding.

Respondent's argument that court-appointed counsel is mandated in any case in which a party may be incarcer-

ated was firmly rejected by the Supreme Court in *Gagnon* v *Scarpelli*, 411 U.S. 778 (1972). In *Gagnon* the court was faced with the issue of whether or not court-appointed counsel was required in proceedings attempting to revoke the probation of criminal defendants. In that case, it was argued that since petitioner faced incarceration as a result of those proceedings, his liberty interest required appointment of counsel in all cases in the same manner as other criminal defendants facing possible incarceration on criminal charges. This argument was rejected, the Court holding that there are degrees of liberty interest, and that convicted criminal defendants had a conditional liberty interest which did not require an automatic rule of appointment of counsel in revocation hearing. The Court in *Gagnon* held that it is necessary to look at the type of proceedings involved before deciding whether or not due process requires appointment of counsel. In evaluating the nature of the proceedings, it was indicated that it would be appropriate to evaluate the complexity, or lack thereof, of the legal and factual issues involved and the formality or informality generally accompanying the proceedings. At most, *Gagnon* only required appointment of counsel in those cases where the presiding judge determined that the issues, whether factual or legal, were of such complexity that appointment of counsel is necessary to insure the fundamental fairness of the proceedings. *Jolly* v. *Wright*, 265 S.E.2d 135 (N.D., 1980). This same result obtained in hearings to revoke parole. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). There is no reason to accord respondent's conditional liberty interest with any more solicitude than that accorded the conditional liberty interest of the parties involved in *Gagnon*. At most, the ruling in *Gagnon* would require, on a case by

case basis, a determination by courts of whether an alleged contemnor was entitled to appointment of counsel.

It therefore follows that respondent has no Sixth Amendment right to appointment of counsel since the proceedings in which he was involved were civil, and thus outside the purview of *Argersinger*. Accord, *Jolly* v. *Wright*, supra; *Sword* v. *Sword*, 249 N.W.2d 88 (Mich., 1976); *Duval* v. *Duval*, 322 A.2d 1 (N.H., 1973).

II

THE UNITED STATES DISTRICT COURT CORRECTLY FOUND THAT COMPETING INTERESTS OUTWEIGH RESPONDENT'S CONDITIONAL LIBERTY INTEREST AND THAT DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF COUNSEL IN RESPONDENT'S CASE.

The Court of Appeals below looked at the possibility of incarceration as the sole criterion for determination of the right to court-appointed counsel. The Supreme Court has followed a more thoughtful analysis in determining right to counsel in *Middendorf* v. *Henry*, 425 U.S. 25 (1976).

The District Court below followed an approach similar to that followed in the *Rael* case by the Supreme Court of New Mexico. The approach of the District Court seems more appropriate for a civil case, pursued by private parties for enforcement of private rights as ordered by the Court. Due process and fundamental fairness have a different perspective when comparing the resources of a mother and children with less than their fair share of resources due to non-payment of child support than when comparing the assets and resources of the State which are available in a criminal case. An analysis fair to both side of the proceed-

ing should include the consideration of competing interests as outlined in *Matthew* v. *Eldridge*, 424 U.S. 319 (1976); the private interest at stake; the government's interest, including any additional fiscal or administrative burdens imposed by additional safeguards; and the risk of erroneous decisions under existing procedures.

Private Interest at Stake

In criminal cases the private interest at stake naturally focuses on the interest of the criminal defendant. A significant distinction in the civil contempt action to enforce child support is that private interests are at stake on both sides of the lawsuit. The contempt was pursued by the mother of Edward John Walker's children. She was represented by privately retained counsel. She and the children had been deprived of property to which they were entitled, child support from the father. They were not provided counsel at government expense to enforce their rights to child support enforcement. Would provision of free counsel to the father without providing it to the mother or to the children be consistent with the equal protection clause of the Fourteenth Amendment?

In divorce cases, the court deals with the issues of divorce vel non, child custody and support, and division of property. The court may hear motions to modify child support orders and may modify child support orders to correspond to the economic situation of the family. A divorce decree entered by the judge in this case had awarded real estate and oil royalty interests to respondent. The court had modified its child support order to reduce respondent's child support obligation.

In contempt hearings in divorce cases that have been heard by the same judge, the judge has heard basically the same evidence it would consider in determining whether respondent would qualify as an indigent. The proceedings in state court were all brought by petitioner's ex-wife in an effort to compel petitioner to at least make some effort at providing support for his minor children. There certainly can be no more compelling private interest than the enforcement of the legal and moral duty of a father to provide support for his minor children.

Government's Interests

The State also has an interest in seeing that minor children are supported by their parents. The natural consequences of parents not providing support to their minor children is an increased burden on both the state and federal governments to provide the support instead of the parents. In addition the State also has an interest in providing its trial judges with an efficient method of ensuring respect both for the court and its orders. Also, it would undeniably impose an additional fiscal burden on the state in general, and the judiciary in particular, to suddenly require appointment of counsel in all civil contempt proceedings.

Risk of Erroneous Decisions

Finally, with regard to the final factor outlined in *Eldridge*, the factual and legal issues involved in contempt proceedings based upon failure to pay child support are rarely so complex as to be beyond the ability of a layman to understand or articulate. As noted by the Federal Dis-

trict Court below, the question of the amount of child support owed is normally a simple bookkeeping matter which should present no complexity whatsoever in most child support contempt proceedings. The other issue in most proceedings, the wilfulness of the failure to pay child support, is likewise a relatively simple and straightforward issue in the vast bulk of child support contempt proceedings. The relative simplicity of these issues does not require the intrusion of appointment of counsel in every case. In fact, respondent in this case had previously presented basically the same issues to the same court with the assistance of counsel on his motion to modify child support.

As pointed out by the Federal District Court below, as well as the court in *Rael*, it is more than sufficient to allow a judge to determine, on a case-by-case basis, whether or not the due process requirement of fundamental fairness mandates appointment of counsel in the case of indigency. Given the ever-increasing caseload facing the judiciary of these type of contempt proceedings, and the obvious burden that appointment of counsel for all indigent contemnors would entail, respondent fails to meet the *Eldridge* test and the Federal District Court below was correct in ruling that there is no Fourteenth Amendment requirement of appointment of counsel in respondent's case.

Respondent has argued that his private interest in liberty is absolute, paramount and subject to no restriction and that this absolute liberty interest places him in an identical position with criminal defendants facing incarceration. His position has been there can be no weighing of competing factors under *Eldridge*, but that appointment of counsel is absolutely guaranteed. Respondent has relied on

language in *Lassiter* indicating that there is a presumption requiring appointment of counsel if incarceration is involved. While this language is in *Lassiter*, it is dicta.

Petitioner would simply echo the District Court's opinion that the crucial distinction between respondent's status and that of criminal defendants is that respondent both prior to and every minute during his incarceration enjoyed the power to free himself from that predicament by simply complying with the court's order or by proving his inability to do so. In this case, there was a finding by the state trial court that respondent had the ability to comply with this order of support. There was no factual determination that respondent is, in fact, indigent, or that he lacks the ability to comply with the court's order. The evidence presented at the September 1983 contempt hearing was more than sufficient to justify the state trial court in its findings. Respondent found himself imprisoned due solely to his efforts to conceal or transfer assets. The fact that respondent chose to be incarcerated rather than make available assets within his control certainly argues forcefully against this Court finding any absolute right to appointment of counsel to a party in respondent's position.

The history of the proceedings involving respondent in the state court below, especially the history of petitioner's actions between the contempt hearing in September and the contempt hearing in February, 1984, are dramatic evidence of the need to distinguish between civil and criminal defendants. It requires a broad interpretation indeed of the United States Constitution to find that it requires that state to pay for the legal representation of a man who has been brought into court by his ex-wife in an effort to col-

lect delinquent child support ordered by the court; for a man who, according to findings by the state court, has had assets available to him which he has wilfully transferred or concealed, making them unavailable for support for his minor children; for a man who has failed to provide one cent of support for his two minor children since ordered by a divorce court on August 19, 1982, despite the fact that that same man has had business dealings, has bought and sold property, and transferred an oil royalty interest to a relative.

Petitioner argues that there is no absolute right to appointment of counsel to a party in respondent's case, and that at most such appointment of counsel should be determined on a case-by-case basis for civil contemnors accused of failing to provide child support. There being no Sixth Amendment right to appointment of counsel to respondent, the fundamental fairness requirement of the Fourteenth Amendment requires an analysis of the competing interests involved. In this case, the United States District Court correctly held that the evidence was insufficient to find any violation of respondent's constitutional rights in the state trial court.

CONCLUSION

For the reasons stated, it is respectfully requested that a Writ of Certiorari be granted to Petitioner herein.

Respectfully submitted,

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November, 1985

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[Filed March 28, 1984]

EDWARD J. WALKER, Petitioner, vs. HONORABLE MILTON CRAIG, District Judge for the Twenty-Third Judicial District, Sitting in Lincoln County, Oklahoma; and RAY McLAIN, Sheriff of Lincoln County, Oklahoma, Respondents.	)	No. 62,011

ORDER

After hearing oral arguments in this matter, the Court refuses to issue writ of habeas corpus and to assume original jurisdiction concerning a temporary stay.

We find on the contempt hearing held by the respondent Judge September 7, 1983, the petitioner was advised of his right to an attorney, which right he waived in open court. Further, petitioner was advised he could seek modification of the child support order, but until modified, the support order remained in effect; and he could seek attorney representation through legal aid.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 28th day of MARCH, 1984.

(s) *Don Barnes*
Chief Justice

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed May 23, 1984]

EDWARD JOHN WALKER, Petitioner,	)	
-vs-	)	No. CIV-84-817-T
RAY McLAIN, SHERIFF OF LINCOLN COUNTY, OKLAHOMA, Respondent.	)	

OPINION AND ORDER

This is a petition for writ of habeas corpus in which petitioner alleges that, at a state court hearing at which he was found guilty of indirect contempt of court, petitioner was denied his right to counsel, as guaranteed by the Fourteenth Amendment to the United States Constitution; that at a subsequent hearing, following which he was incarcerated for indirect contempt, petitioner was denied his right to appointed counsel as guaranteed by the Fourteenth Amendment to the U. S. Constitution; and that the continued detention of petitioner, absent a present ability to purge the contempt, and when such detention is life threatening, is unduly punitive and violates due process of law.

In a divorce decree entered in Lincoln County, Oklahoma District Court, petitioner was ordered to make monthly child support payments. Upon petition of his former wife, petitioner was ordered to show cause why he should not be held in contempt for failure to make the payments as required. A hearing was held before the Lincoln County District Judge in September 1983. Petitioner appeared, without counsel, and, at the conclusion of the hearing, was found guilty of indirect contempt of court. The amount of the payments then in arrears was reduced to judgment and the court directed that petitioner could purge himself

of contempt by making child support payments as required when due and, in addition, by paying the sum of $50 per month on the amount in arrears, aggregating $960. It was further provided that if petitioner's former wife executed upon certain of petitioner's royalty checks, the $50 per month payments on back child support would no longer be required. Finally, the court directed that petitioner pay a $150 attorney fee to plaintiff's attorney and assume costs of the proceedings.

In February 1984, a hearing was held in Lincoln County District Court on the Motion to Accelerate Sentencing filed therein by petitioner's former wife. At the conclusion of that proceeding, the court sustained the motion, found that petitioner had failed to comply with the terms of the court-ordered "deferred sentencing" (although there was no reference to sentencing in the previous order), and petitioner was sentenced to a term of ninety days in the Lincoln County jail. It was further ordered that petitioner could purge himself of contempt by paying $1,000 on the back child support and continuing the payment of current child support as required.

In the above described "judgment and sentence," the court noted that it had advised petitioner of his right to an attorney, which right petitioner had waived in open court.

Petitioner thereafter sought a writ of habeas corpus in the Supreme Court of the State of Oklahoma. That court, after hearing oral arguments, refused to issue the writ or to assume original jurisdiction with regard to a temporary stay. The court found, in an order entered March 28, 1984, that in the September 1983 hearing, at which petitioner was found in indirect contempt of court, he had been advised of his right to an attorney, and had waived that right in open court. It was further found by the court that petitioner had been advised that he could seek modification of the child support order, but that until the same was modified, the support order remained in effect. Finally, the

court found that petitioner was advised that he could seek attorney representation through legal aid.

Upon the filing of this action, petitioner also filed an Application for Temporary Stay, seeking an order of this court staying the execution of his 90-day sentence pending the determination of his petition. This application was based upon the concededly poor state of petitioner's health.

This court declined to grant the extraordinary relief sought by petitioner in his application. In doing so, the court noted that, although copies of some medical statements, reports and opinions were submitted by petitioner, the conclusions in the documents submitted with regard to the adverse effect specifically of continued incarceration upon petitioner were non-medical conclusions. The court also noted that under the provisions of 57 O.S. 1981, §§41 et seq., the Sheriff is in charge of the county jail and all persons confined therein, and that one of his responsibilities is to provide adequate medical care for county prisoners. The court noted that it appeared clear from the documents submitted that the Sheriff had, since the imposition of the sentence by the Lincoln County District Judge, made appropriate arrangements for the care and housing of petitioner in the county jail, that he had caused petitioner to be hospitalized when he deemed it necessary, that such was clearly in his power, and that it was clear that he would exercise this power when, as and if necessary in the future.

Respondent has filed an answer to the petition, conceding that petitioner presented the issues raised in this petition to the Supreme Court of the State of Oklahoma in his application to that court for a writ of habeas corpus. Respondent then asserts, in essence, that, under *Sumner* v. *Mata*, 449 U.S. 539 (1981), and 28 U.S.C. §2254(d), the finding of the Supreme Court of the State of Oklahoma in its March 28, 1984 order, with regard to petitioner's advice of his right to counsel and waiver of same, was entitled to a presumption of correctness.

Petitioner responds by citing the provisions of 28 U.S.C. §2254(d) themselves, in which eight exceptions to the presumption of correctness rule are recited.

Since the filing of respondent's answer the court has been provided with a certified transcript of the September 1983 hearing before the Lincoln County District Judge, at which the contempt determination was made. The court has also been advised by petitioner and respondent that the February 1984 sentencing proceedings were not recorded and that therefore no transcript of such proceedings is available and that no record was made of the proceedings before the Supreme Court of the State of Oklahoma, consisting only of oral argument, and that therefore there is likewise no transcript available of those proceedings.

The court has also been provided, by petitioner, with a transcript of the deposition taken by petitioner's counsel of the Lincoln County District Judge before whom the September 1983 and February 1984 proceedings were held.

In his deposition, the District Judge asserts that he advised petitioner of his right to employ counsel and be represented by counsel at both proceedings. The District Judge's testimony is clear, however, to the effect that he did not advise petitioner of any right to the appointment of counsel. When asked whether such advice was given to petitioner, the District Judge responded in the negative, stating that the existence of any such right was not his "understanding of the law."

The deposition testimony of the District Judge is to the effect that he told petitioner prior to the September 1983 hearing that he could have a lawyer present with him at the proceeding, but that petitioner responded that he could not afford one.

Such colloquy apparently occurred prior to the commencement of the hearing itself, as it does not appear in the transcript of the proceedings. References to counsel ap-

pear later in the transcript, along with the District Judge's advice to petitioner that he could obtain legal advice and counsel through the legal aid offices. Clearly, then, the District Judge did not believe that petitioner had any right, constitutional or otherwise, to the appointment of counsel to represent him in the civil contempt proceedings. Petitioner asserted before the Supreme Court of the State of Oklahoma that the failure of the district court to advise him of his right to the appointment of counsel if he could not afford to employ counsel was a violation of his constitutional rights. Although the Supreme Court of the State of Oklahoma did not specifically refer to this contention in its brief order denying the application for the writ of habeas corpus and declining to assume original jurisdiction for the purposes of a stay, the language and tenor of that order is clearly to the same effect. The court finds that plaintiff was advised of his right to counsel, not of his right to the appointment of counsel, and that he waived the same. This is consistent with the deposition testimony of the Lincoln County District Judge. The Supreme Court of the State of Oklahoma, in addition, referred to the District Judge's comments to petitioner with regard to the availability of counsel through Legal Aid. Implicit in the Order of the Supreme Court of the State of Oklahoma is that court's view, consistent with that of the District Judge, that in the State of Oklahoma there is no right, constitutional or otherwise, to the appointment of counsel in civil contempt proceedings.

In view of the foregoing, the court's first inquiry will be whether an indigent alleged contemnor in a child support case is entitled under the United States Constitution to the appointment of counsel to represent him. In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that the Sixth Amendment right to counsel is a fundamental right essential to a fair trial and that it is therefore binding on the States through the Fourteenth Amendment. The court further held that representation by counsel is essential to protect the fundamental rights of life and liberty of

an accused in a criminal prosecution and that counsel must therefore be appointed if the defendant is indigent. 372 U.S., at 342-43.

In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1971), the Court found that the rationale of *Gideon* applies to any criminal prosecution, no matter how petty, whenever the defendant stands to be deprived of his liberty as a result of the proceeding, and that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.*, at 37. In so holding, the Court noted that imprisonment is never trivial to the person being deprived of his liberty and that it is the result, not the nature of the particular offense, that requires the appointment of counsel.

After its decision in *Gideon*, but before *Argersinger* was decided, the Supreme Court, in *In re Gault*, 387 U.S. 1 (1966), that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed," the juvenile has a right to appointed counsel even though those proceedings may be styled "civil" and not "criminal."

The foregoing language from *In Re Gault* was quoted by the Supreme Court in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), in which an indigent parent asserted an absolute due process right to the appointment of counsel in connection with proceedings toward the termination of her parental rights. The Supreme Court found that such right was not absolute, stating that there was a presumption that an indigent litigant has a right to appointed counsel only when, if he is unsuccessful, he may be deprived of his physical liberty. Since petitioner in *Lassiter* was not threatened with the loss of her physical liberty, the court directed the consideration in such cases of a three-part due process test announced in *Mathews* v. *Eld-*

ridge, 424 U.S. 319 (1976). These factors are: The private interest at stake; the government interest, including any additional fiscal or administrative burdens imposed by additional safeguards; and the risk of erroneous decisions under existing procedures. The Court then determined that in cases where the right to appointed counsel was not absolute, a case-by-case determination should be made, as set out in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972), a case involving the conditional liberty interest of a probationer.

Petitioner urges that his liberty interest was absolute, not conditional, as he was clearly threatened with the loss of his liberty in the civil contempt hearing before the Lincoln County District Judge in the event the hearing resulted in an adverse determination. Thus, petitioner urges that his right to the appointment of counsel, if he was determined to be indigent, is similarly absolute, and that the three factors set out in *Mathews* v. *Eldridge*, *supra*, need not be considered. In the alternative, of course, petitioner contends that even if such factors are considered, his right to appointed counsel is established, and the failure to advise him of such right was violative of his constitutional rights.

Petitioner cites in support of his petition two recent United States District Court cases from Ohio. In both *Young* v. *Whitworth*, 522 F.Supp. 759 (S.D. Ohio, W.D. 1981), and *Mastin* v. *Fellerhoff*, 526 F.Supp. 969 (S.D. Ohio, W.D. 1981), plaintiffs were found in contempt of orders of the Hamilton (Ohio) County Court of Common Pleas, for nonpayment of child support, and each was ordered incarcerated. In each case, the U.S. District Judge to whom the case was assigned reviewed the precedents described above.

In *Young*, the court refers to cases in the second, fourth, eighth and ninth circuits in which it was held, or simply assumed, that an indigent alleged contemnor was entitled to appointed counsel at a hearing which could result in his incarceration: *Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972) [civil contempt to compel a witness to answer ques-

tions before a grand jury after the grant of transactional immunity]; *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973) [counsel appointed upon grand jury witness' representation that he could not afford an attorney, when the government moved that he be adjudged in civil contempt for refusal to testify after being granted immunity]; *In re DiBella*, 518 F.2d 955 (2nd Cir. 1975) [witness' refusal to answer grand jury questions]; and *United States* v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) [failure to comply with order to produce records for IRS].

In the later case, the action was remanded to the district court for a finding on the question of indigency and it was ordered that if the contemnor was found to have been indigent, the judgment was vacated and the district court ordered to appoint counsel and readjudicate the contempt charge. In a footnote, 553 F.2d, at 1156, n.2, the court noted that although *Argersinger* was clearly applicable by its terms to criminal cases, the majority opinion and two concurring opinions in that case "suggests that where a court action may result in a deprivation of liberty, due process requires that the person facing the loss of liberty be represented by counsel."

The Court in *Young* v. *Whitworth*, *supra*, then discusses in detail the three balancing factors of *Mathews* v. *Eldridge*, *supra*, consideration of which is mandated by *Lassiter* v. *Department of Social Services*, *supra*. Although the court recognizes the significant governmental interests and the heavy fiscal and administrative burdens which would result from its decision, "[b]ecause of the extreme weight to be given to the petitioner's interest here, even a modest reduction in the potential for error in the deprivation of that interest justifies the imposition of appointed counsel."

In *Mastin* v. *Fellerhoff*, *supra*, the court holds that the right to counsel in civil contempt proceedings, which may result in imprisonment of the defendant, is absolute, and

that therefore the *Mathews* v. *Eldridge* balancing factors need not even be considered. The court states that: "To characterize a proceeding as civil rather than criminal is a distinction without a difference if the end result is loss of physical liberty." The court goes on to determine that, even if the *Mathews* v. *Eldridge* factors are considered, the alleged contemnor's interests so far outweigh the interests of the State and the risks of erroneous decisions are so great, that a right to appointed counsel clearly exists in all such cases.

Subsequently, in *Cobb* v. *Green*, 574 F.Supp. 256 (W.D. Mich. S.D. 1983), an unemployed father held in civil contempt for failure to pay child support was ordered committed to the county jail. His incarcerated [*sic*]was prevented by a district court's temporary restraining order. The court, citing post-*Lassiter* decisions, including *Mastin* and *Young*, supra, and *McNabb* v. *Osmundson*, 315 N.W.2d 9 (Iowa 1982), found that plaintiff had shown a strong or substantial likelihood or probability of success on the merits; that plaintiff would be irreparably injured if a preliminary injunction were not issued; that there was no adequate remedy at law for the deprivation of one's physical liberty; and that the public interest would be served by granting a preliminary injunction.

It is noteworthy that, of the cases which indicate a constitutional right to the appointment of counsel, only *Young*, *Mastin* and *Cobb* involve civil contempt determinations in child support matters. Further, although the language and the holdings in all these cases are quite strong, it should be noted that each ultimately involved the determination of a preliminary matter; *Young*, the denial of respondent's motion to dismiss a petition for writ of habeas corpus; *Mastin*, the granting of plaintiff's motion for summary judgment in an action said to have originally been filed as a motion for preliminary injunctive relief; and *Cobb*, the granting of preliminary injunctive relief.

This court has found no authority in the Tenth Circuit controlling the issues raised herein. Surprisingly, neither has the court been directed to nor has the court found any definitive authority in the reported decisions of the Supreme Court of the State of Oklahoma. A recent case in the Supreme Court of the State of New Mexico, however, cited in *Cobb*, is of interest, not only because of its result, but because it raises an important consideration not raised, or even mentioned, in the decisions cited herein. In *State Department of Human Services* v. *Rael*, 642 P.2d 1099 (N.M. 1982), the court was presented with a question of first impression in New Mexico, whether an indigent is entitled to court-appointed counsel in a civil contempt proceeding brought to enforce an order of child support.

The court first cites *Argersinger*, *supra*, as authority for the proposition that the Sixth Amendment right to counsel guarantee applies only to criminal prosecutions. Noting that the Supreme Court has rejected the determination of the existence of that right solely upon the label given to a proceeding, *see Middendorf* v. *Henry*, 425 U.S. 25 (1976), the court sets about determining whether this type of contempt proceeding was in fact civil or criminal for purposes of the Sixth Amendment. The most important of a number of factors considered in making this determination is said to be the nature and the purpose of the punishment. *State* v. *Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957). The court quotes from *International Min. & C. Corp* v. *Local 177, U.S. & A. P.W.*, 74 N.M. 195, 392 P.2d 343 (1964), as follows:

> "Commitments and fines for criminal contempt are imposed for the purpose of vindicating the authority of the court and are punitive in nature and intended as a deterrent to offenses against the public. Punishment for civil contempt is remedial and for the benefit of the complainant; it is coercive rather than punitive and is made contingent upon the defendant's compliance with the order of the court. . . ."

In discussing certain other factors required to be considered by it, the court notes that although petitioner could have been criminally prosecuted for non-support, the proceeding appealed from was civil in nature, an enforcement action based on a paternity and support suit, and not a proceeding separate and independent from the original suit. Further, although the State brought the action, it merely acted as assignee for the mother's claim for non-support, rather than exercising its police power. The State is therefore said to be acting as a private party. The act for which plaintiff would be held in contempt would be his failure to pay support in compliance with the court order, rather than an act done in disrespect of the court, or one which obstructs justice or tends to bring the court into disrepute.

Finally, the court notes that the nature and purpose of the punishment are clearly civil. The order to show cause revealed the remedial nature of punishment, as the amount for which judgment would be entered was equal to the amount of the original judgment plus unpaid support from the time of judgment, and would be payable to the Department of Human Services, and not to the court, (just as the payments herein would be payable to petitioner's former wife).

Since petitioner is said to hold the keys to his prison since he can avoid the contempt by either complying with the order or showing his inability to comply due to no fault on his part, the court holds that the proceeding was a civil contempt proceeding and not a criminal prosecution implicating the right to counsel provisions of the Sixth Amendment.

In a second division of the opinion, the court addressed the Due Process Clause of the Fourteenth Amendment, which was said to be implicated since petitioner faced the threat of imprisonment. The court opened its discussion by stating that it must decide whether petitioner, in order to have a fundamentally fair contempt hearing, is required to be represented by court-appointed counsel. The court

then discusses the Supreme Court decision in *Lassiter* v. *Department of Social Services*, *supra*, and the three balancing factors of *Mathews* v. *Eldridge*, *supra*. After a lengthy discussion of the three balancing factors, the court summarizes its determination as follows:

> "When we balance all these factors against each other, we conclude that due process does not require that appointed counsel be provided in every instance in which an indigent defendant faces civil contempt charges that might subject him to incarceration. As we have explained, the defendant's liberty and property interests are not as vulnerable in the context of the civil contempt hearing as in the criminal setting. The provision of court-appointed counsel would do little to reduce erroneous decisions here, where the legal and factual issues are not complex. These factors, when added to the state's interests, militate against a rule requiring appointment of counsel in all cases such as this one."

The court then notes that the historical presumption in favor of the appointment of counsel is weakened in cases such as these, where the defendant "has the keys to his own prison," his liberty interests not being the full-blown interests found in cases such as *In re Gault*, *supra*, and *Vitek* v. *Jones*, 445 U.S. 480 (1980), where the defendant has no control over whether or not he remains incarcerated or committed to an institution. The court concludes as follows:

> "We therefore hold that the due process claus of the [F]ourteenth [A]mendment does not require the appointment of counsel in every case where an indigent faces the possibility of imprisonment if found to be in civil contempt for failure to comply with an order of support."

The court then recognizes, citing *Duval* v. *Duval*, 914 N.H. 422, 322 A.2d 1 (1974), that there may be cases in which

a defendant would be deprived of a fundamentally fair contempt hearing if the assistance of counsel were not provided. In *Duval*, the discussion of this factor begins with the words "[I]n some nonsupport contempt cases, which are not routine in nature. . . ."

The *Rael* court then remands the case to the trial court for evaluation of the need for counsel in this case, determining that such need must be established on a case-by-case basis.

This court agrees with the Supreme Court of New Mexico, which draws a distinction between civil contempt proceedings arising out of non-compliance with support orders and those arising from other causes. The issues for the most part are readily determinable and uncomplex. The government has strong interests in seeing that its minor citizens are supported and that the decrees of its courts are complied with. As is acknowledged by the court in *Young* v. *Whitworth*, a monumental fiscal and administrative burden would be imposed upon the states judicial and social welfare system by the requirement that counsel be appointed to represent all indigents charged with civil contempt in non-complex support cases.

In this case, the Lincoln County District Judge made clear to petitioner on more than one occasion that he had the right to have and be represented by counsel, and that legal advice and counsel could be obtained through Legal Aid. He further advised petitioner on more than one occasion that by complying with the court's order for installment payments on the past due support obligation, he could avoid incarceration, and that he could, at any time, petition the court for modification of the original support order, which would be appropriate upon a proper showing of changed circumstances and of petitioner's present inability to meet the obligations imposed by the original order. At no time between September 1983 and February 1984 did petitioner make any effort, so far as the record

before this court reveals, to seek modification of the original order. Further, although petitioner has been ably represented by attorneys with Legal Aid since shortly after the February 1984 sentencing, there is no indication that any effort has been made by petitioner through such counsel to obtain a modification of the original order, or to obtain a stay from the Lincoln County District Judge of his order committing petitioner. Counsel has sought such a stay from the Supreme Court of the State of Oklahoma in conjunction with the application for a petition for writ of habeas corpus, and has sought such a stay from this court in conjunction with this action.

It is not this court's function to determine whether the oirginal support order should be modified or to determine whether petitioner is indigent, or to determine petitioner's present ability to comply with the support order. This court does not possess supervisory authority over the district courts of the State of Oklahoma, as state Supreme Courts possess over the lower courts of their respective states. This court's function in this action is solely to determine whether petitioner is being held in custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. §§ 2241 and 2254.

It appears to this court that petitioner herein has, and has had, continually since the September 1983 contempt hearing, the ability to avoid incarceration, through compliance with the Lincoln County District Judge's order entered following that hearing, applying to that court for a stay of its contempt finding by reason of petitioner's inability to comply with the order, or applying to that court for modification of the original support order on the basis of changed circumstances. Petitioner has adopted none of these approaches, but has instead chosen to seek his release from incarceration on federal constitutional grounds.

This court is convinced that the distinction drawn by the Supreme Court of New Mexico in *Rael* between civil

contempt cases arising out of support orders and other cases is an appropriate distinction, for the reasons stated by that court.

This court is also of the view that the liberty interest of a person in petitioner's position is not absolute, and that therefore the balancing factors in *Mathews* v. *Eldridge, supra*, must be weighed and considered by the court. *See Lassiter, supra.*

Petitioner's liberty interest, though unquestionably important, is significantly reduced by the fact that the threat of incarceration is conditional, and that petitioner himself can avoid incarceration by fulfilling the condition or establishing his inability to do so before the court which is threatening to incarcerate him. Thus, in these cases, this court is of the opinion that petitioner's liberty interest is not entitled to the "extreme weight" accorded it in *Young* v. *Whitworth* and *Mastin* v. *Fellerhoff, supra.*

The court in both of the aforementioned cases recognized the substantial fiscal and administrative burden which would be imposed upon the courts and the social welfare systems of the State of Ohio by the imposition of the rule ultimately announced by them. Recognizing the magnitude of the burden which such a rule would impose in Oklahoma and further recognizing the State's legitimate interest in obtaining the proper support of its minor citizens and in obtaining compliance with and enforcement of its courts' orders, this court is unwilling to impose such a rule upon the government of the State in which it sits, absent controlling precedent from the United States Court of Appeals for the Tenth Circuit or from the Supreme Court of the United States. As is noted above, no such precedent has been found in the Tenth Circuit, and in the view of this court, the Supreme Court decisions discussed above do not compel such a result in circumstances such as are present here. Finally, this court agrees with the conclusion by the *Rael* court that, absent special circumstances, not pres-

ent here, civil contempt proceedings in support cases are not complicated from either the standpoint of marshalling of facts or presentation of proof, and that the risk of erroneous decisions in the absence of appointed counsel in most such cases is not significant.

Weighing the balancing factors of *Mathews -. Eldridge, supra*, as they exist in this case, this court holds that in the absence of special circumstances, not present here, an indigent parent does not have a constitutional right to the appointment of counsel in connection with a civil contempt hearing arising out of non-payment of obligations under a support order, even though the results of such hearing may be incarceration of the parent as an alternative to compliance with the order.

With respect to petitioner's contention with regard to his health, this court has previously determined that the Lincoln County Sheriff is obligated, and fully empowered, to take whatever action is necessary to obtain medical care and attention for prisoners in his custody. The Sheriff has in fact caused petitioner to be hospitalized when the same was necessary, and the court has not been presented, or offered, any medical evidence to the effect that continued incarceration in the Lincoln County jail can be expected to exacerbate petitioner's medical condition.

In the circumstances, as set forth herein, the petition for writ of habeas corpus filed herein by petitioner should be denied and petitioner's action dismissed.

IT IS SO ORDERED.

Dated this 23rd day of May, 1984.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-853

In the Supreme Court of the United States

OCTOBER TERM, 1985

RAY McLAIN,
Petitioner,
v.
EDWARD JOHN WALKER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

PUBLISH

[Filed July 25, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD JOHN WALKER, Petitioner-Appellant, v. RAY McLAIN, Sheriff of Lincoln County, Oklahoma, Respondent-Appellee.	)	No. 84-1886

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-84-817-T)

Steven A. Novick, Legal Aid of Western Oklahoma, Oklahoma City, Oklahoma, for Petitioner-Appellant.

William D. Simpson, District Attorney's Office, Chandler, Oklahoma, for Respondent-Appellee.

Before McKAY, McWILLIAMS and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

The issue in this case is whether an indigent person facing incarceration in a civil contempt action for nonsupport is entitled to have appointed counsel.

The relevant facts are not in dispute. After his divorce from his wife, petitioner was ordered to pay $500 per month

in child support. Of this amount, $380 represented the children's share of his monthly social security disability benefits, and $120 represented payments to be made out of petitioner's income. Petitioner's wife has received the $380 each month, but petitioner has never paid the $120 per month additional support obligation. Petitioner claims he is unable to meet this obligation because of indigency. On February 15, 1984, a state trial court found the failure to make support payments to be wilful, held petitioner in contempt, and sentenced him to jail for 90 days, or until he paid $1,000 to purge the contempt. It is undisputed that the trial court did not advise petitioner of any right to appointment of counsel, nor was counsel appointed for him.

The case was originally filed as a habeas corpus action alleging that petitioner's incarceration for civil contempt was illegal because the state trial court had failed to appoint counsel to represent him or to advise him of his right to appointed counsel. The district court denied the petition, and this appeal followed.

The first question that must be addressed is whether the case is moot, since petitioner has served his contempt sentence and is now out of jail. We find this case not to be moot because it falls within the category of cases challenging conduct that is "capable of repetition yet evading review." This doctrine was first enunciated in *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911). In the absence of class action, it is limited to situations where: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

The present case meets both of these requirements. Petitioner's contempt sentence was for 90 days, a time that expired long before his case could be reviewed. Respondent conceded at oral argument that 90 days is, to his

knowledge, the maximum time served for civil contempt for nonsupport. Secondly, it is likely that petitioner will be subjected to the same conduct again. He asserts that his failure to pay is due to indigency and that as long as his indigency continues he will remain unable to meet his support obligations. There is thus a clear risk that he will once again be held in contempt for nonsupport and again be subjected to imprisonment.

In addition, although petitioner has been released, the contempt order has never been vacated. Since petitioner may suffer collateral consequences flowing from his contempt conviction, his case is not moot. *Carafas* v. *LaValle*, 391 U.S. 234 (1968). The state may, for example, rely on the finding of contempt in determining child visitation rights or in other child support proceedings. *See Pirrong* v. *Pirrong*, 552 P.2d 383, 385 (Okla. 1976). A habeas corpus challenge is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Lane* v. *Williams*, 455 U.S. 624, 632 (1982) (quoting *Sibron* v. *New York*, 392 U.S. 40, 57 (1967)). The possible collateral consequences arising from defendant's still valid contempt conviction save this case "from ending ignominiously in the limbo of mootness." *Ridgeway* v. *Baker*, 720 F.2d 1409, 1411-12 n.2 (5th Cir. 1983) (quoting *Sibron*, 392 U.S. at 55) (finding case not to be moot because contempt conviction might be used in separate child support proceedings). Thus, we find the case not to be moot despite petitioner's release from confinement.

The government asserts that petitioner was not entitled to appointed counsel because the contempt proceeding that resulted in his incarceration was a civil rather than a criminal proceeding. We cannot accept such a proposition.

"It is the defendant's interest in personal freedom, and not simply the special sixth and fourteenth amendment right to counsel in criminal cases, which triggers the right

to appointed counsel." *Lassiter* v. *Department of Social Services of Durham County*, 452 U.S. 18, *reh. denied*, 453 U.S. 927 (1981). It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as "criminal" or "civil," but on whether the proceeding may result in a deprivation of liberty. *Ridgeway* v. *Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983).

The case of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), sets forth the elements to be evaluated in deciding what due process requires: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the fiscal and administrative burdens additional procedures would entail.[1] The petitioner's interest in this case is one of the most important protected by our constitution — the interest in personal liberty. The district court rejected petitioner's claim, in part, because petitioner "holds the keys to the prison door," in that he need serve no time in jail if he pays to purge the contempt. Thus, it is argued,

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[1] Petitioner argues that the *Mathews* analysis is inapplicable because khere liberty is at stake a person is presumptively entitled to counsel. Petitioner's Brief at 26-27. However, the language in *Lassiter* on which he relies does not mean that the *Mathews* analysis does not apply when personal liberty is at stake. Rather, it indicates that, where personal liberty is *not* at stake, the court must take a second step in the analysis and weigh the combination of the *Mathews* factors against a presumption *against* the right to counsel. *Lassiter*, 452 U.S. at 27. When liberty is at stake, as in this case, the presumption does not come into play, and the court should follow the standard due process analysis

petitioner's liberty interest is conditional, and, as in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearing), and *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (parole revocation hearing,[2] petitiooner's right to appointed counsel is not absolute.

It is true that the defendant's right to appointed counsel diminishes as his interest in personal liberty diminishes. *Lassiter*, 452 U.S. at 26. However, petitioner's liberty interest cannot truly be viewed as conditional. If petitioner is truly indigent, his liberty interest is no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison door if he cannot afford the price. The fact that he should not have been jailed if he is truly indigent only highlights the need for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigency and ensuring that he was not improperly incarcerated. The argument that the petitioner has the keys to the jailhouse door does not apply to diminish petitioner's liberty interest.

The state has an interest in seeing that minor children are supported, but this interest would in no way be undercut by providing counsel to aid the nonsupporting parent in establishing that his failure to pay is not wilful. The state has an interest in ensuring the accuracy of the determination reached in a civil nonsupport action and, as will be discussed, a lawyer will aid in achieving this goal. While the state does have an interest in minimizing the cost of such proceedings, this interest, in monetary savings cannot outweigh the strong private interest of the petitioner and the substantial procedural fairness achieved by providing a lawyer for the indigent defendant in a civil contempt proceeding. *See Lassiter*, 452 U.S. at 28; *Nordgren* v. *Mitchell*, 716 F.2d 1335, 1339 (10th Cir. 1983).

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[2] The rule in these cases has since been abrogated by statute. *See* Baldwin v. Benson, 584 F.2d 953 (10th Cir. 1978).

Finally, the risk of an erroneous deprivation of liberty created by refusing to appoint counsel for the indigent petitioner is high. The courts have long recognized the importance of a lawyer in protecting the right to liberty. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967). The presence of counsel goes to the very integrity of the fact finding process. As the Supreme Court has noted:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. *Alabama*, 287 U.S. 45, 69 (1932). The issues in a proceeding for wilful nonsupport are not so straightforward that counsel will not be of assistance in insuring the accuracy and fairness of the proceeding. This is particularly true where the petitioner is indigent and is attempting to prove his indigency as a defense to wilfulness.

Indeed, because of the importance of counsel in ensuring the integrity of the fact finding process, our preferred course would be to require that counsel be appointed to assist a defendant in proving that he is "indigent" and therefore entitled to counsel. If the defendant were then found to have funds available for securing his own counsel, he could be required to reimburse the government for the cost of the counsel provided at the preliminary indigency determination.[3] Unfortunately, however, even criminal de-

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[3] Many states have recoupment statutes, as does the Criminal Justice Act of 1964, which governs appointment of counsel in federal criminal cases. The Supreme Court has held that requiring a defendant to reimburse the government does not infringe on the defendant's constitutional

fendants are not entitled to assistance of counsel in their attempts to prove that they are entitled to appointed counsel under the current state of the law. Thus, it would be inappropriate to extend that right to defendants in civil contempt proceedings at this time. However, due process does require, at a minimum, that an indigent defendant threatened with incarceration for civil contempt for non-support, who can establish indigency under the normal standards for appointment of counsel in a criminal case, be appointed counsel to assist him in his defense. Our decision is consistent with that of every federal appellate court that has considered this question. *See Sevier* v. *Turner*, 742 F.2d 262 (6th Cir. 1984); *Ridgeway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983) (finding sixth amendment right to counsel); *Nordgren* v. *Mitchell*, 716 F.2d 1335 (10th Cir. 1983) (by implication); *Henkel* v. *Bradshaw*, 483 F.2d 1386 (9th Cir. 1973) (dictum). In addition, the federal courts have uniformly recognized the right to appointed counsel in other types of civil contempt proceedings. *United States* v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) (contempt for refusing to comply with grand jury summons); *In re DiBella*, 518 F.2d 955 (2d Cir. 1975); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *In re Grand Jury Proceedings: United States* v. *Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972).

Petitioner was held in contempt and jailed without the assistance of counsel and without being informed of his right to appointed counsel if indigent. An indigent's right to appointed counsel imposes on the court an obligation to inform him of that right. *See Miranda* v. *Arizona*, 384 U.S. 436, 473 & n.43 (1965). In the absence of such notice, an indigent defendant cannot be said to have waived his right

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[3] (Continued)

right to counsel if the statute is "carefully designed to ensure that only those who actually become capable of repaying the state will ever be obliged to do so." Fuller v. Oregon, 417 U.S. 40, 53 (1973). There would thus be no constitutional obstacle to requiring reimbursement from those defendants who are found to be financially able to afford counsel.

to counsel. While we have no clear indication of whether petitioner, if informed of the right, would have met the standards of financial inability required for appointment of counsel, we need not remand for a determination of that question. As the Supreme Court stated in *Miranda*,

> While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability where there is any doubt at all on that score.

384 U.S. at 473 n.43. In the present case, the very issue in the contempt proceeding was petitioner's alleged inability to pay his support obligations. Clearly there is sufficient doubt concerning his ability to pay a lawyer that failure to warn him of his right to appointed counsel if indigent cannot be considered harmless error. Petitioner's contempt conviction thus was obtained in violation of his due process rights, and cannot stand.

The state may, if it chooses, cite petitioner again for wilful failure to pay child support. The court would then be required to determine whether he meets the standards for appointment of counsel. If he does, counsel must be appointed to represent him. If, with the assistance of counsel, he is unable to prove indigency, it may validly jail him for contempt. It may not, however, rely on a contempt order entered without the assistance of counsel and without notice of the right to appointed counsel.

The judgment is reversed and the case remanded with instructions to grant the writ of habeas corpus and order petitioner's civil contempt order vacated.

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-853 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

RAY MCLAIN, Sheriff of Lincoln County, Oklahoma,
Petitioner,

VS.

EDWARD JOHN WALKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

REPRINTED COPY

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December, 1985

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QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

1. Whether the Sixth Amendment to the United States Constitution requires the appointment of counsel to indigent defendants who have been cited for contempt in a civil contempt proceeding brought by a private party to enforce a child support obligation.

2. Whether the Fourteenth Amendment of the United States Constitution requires the appointment of counsel to indigent defendants in the above mentioned situation.

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No. 85-853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RAY MCLAIN, Sheriff of Lincoln County, Oklahoma,
Petitioner,

VS.

EDWARD JOHN WALKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The May 23, 1984 opinion and order of the district court is unreported, but appears in the petition for certiorari as Appendix B. The Tenth Circuit's opinion, styled Edward John Walker vs. Ray McLain, Sheriff of Lincoln County, Oklahoma, was filed on July 25, 1985 and is published at 768 F.2d 1181 (10th Cir. 1985), and appears in the Supplemental Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The material facts are not in dispute. After a divorce from his wife, respondent was effectively ordered to pay $500 per month in child support. Of this amount, $120 represented payments to be made out of respondent's income, and $380 represented the children's share of respondent's social security benefits based upon his disabling condition of advanced degenerative heart disease. The wife has received the $380 each month, but respondent has not paid the $120 per month additional support obligation. Respondent claims that he is unable to meet this obligation due to his indigency.

On September 7, 1983, respondent was tried and found guilty of contempt for wilful failure to pay support, but was not incarcerated at that time. Thereafter, on February 15, 1984, respondent was again found guilty of contempt for nonsupport. Based upon both the September 7, 1983 and February 15, 1984 contempt orders, respondent was sentenced to ninety days in the county jail, or until he paid a lump sum of $1000 to purge the contempt. Respondent began serving his sentence on February 17, 1984.

Respondent was not represented by counsel at either contempt hearing. It is undisputed that the state trial court did not advise respondent of any right to the appointment of counsel at either hearing, nor was counsel appointed. It is also undisputed that the state trial court never made any inquiry into respondent's financial ability to employ counsel, even though respondent expressly claimed an inability to afford an attorney.

On March 27, 1984, respondent sought habeas corpus in the Oklahoma Supreme Court, claiming *inter alia* that he had been denied due process of law by the trial court's failure to advise him of his right to appointed counsel at the contempt hearings. The Oklahoma Supreme Court denied habeas corpus without a full development of respondent's constitutional claim.

On March 29, 1984, respondent commenced this action for habeas corpus in the district court claiming that his imprisonment was illegal because the state trial court had failed to advise him of his right to appointed counsel, and had failed to appoint counsel to represent him. Following the submission of authorities, the available state court record and a deposition of the state court judge, the district court entered an order on May 23, 1984 denying the habeas corpus petition.

Respondent filed a motion to alter or amend judgment on May 31, 1984, and the motion was denied by the district court on June 13, 1984. Respondent then filed his notice of appeal on June 21, 1984. Upon respondent's application, the district court issued a certificate of probable cause for appeal on August 6, 1984.

The cause was argued in the Court of Appeals for the Tenth Circuit on April 19, 1985. On July 25, 1985, the Court of Appeals issued its order reversing the judgment of the district court, and holding that due process compels the appointment of counsel, and advice as to the availability thereof, for an indigent defendant threatened with incarceration in a civil contempt proceeding for nonsupport. Petitioner now seeks review of this order by writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Questions Presented For Review Are Likely to Become Moot During The Pendency Of This Appeal.

The Court of Appeals correctly found that respondent's constitutional claim was not moot, even though he had been released from jail,[1] because there was a reasonable expectation that the challenged conduct was capable of repetition, yet evading review. *Walker* v. *McLain*, 768 F.2d 1181, 1182 (10th Cir. 1985). *See Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *Rex* v. *Owens*, 585 F.2d 432 (10th Cir. 1978). The Court of Appeals also noted the possibility of collateral consequences flowing from respondent's contempt conviction. *Walker* v. *McLain*, 768 F.2d at 1183. *See Sibron* v. *New York*, 392 U.S. 40 (1968). Under Oklahoma law, for example, the still valid contempt order could be used to affect respondent's rights in subsequent custody, visitation or support proceedings. *See, e.g., Pirrong* v. *Pirrong*, 552 P.2d 383 (Okla. 1976).

The finding of the Court of Appeals that this case was not moot, however, implicitly depended upon the existence of a crucial underlying fact, viz., the minority of respondent's children.[2] This is so because, under Oklahoma law, a child support order may not be enforced by contempt

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[1] Even though respondent had been released from his imprisonment, habeas corpus was still an available remedy because 28 U.S.C. §2254 "does not limit the relief that may be granted to discharge . . . from physical custody." *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968).

[2] Children attain majority in Oklahoma at the age of eighteen. *See* 15 O.S. 1981 §13. *See also* 10 O.S. 1981 §§91 and 1101.

once the minor children of the parties have attained majority. *Potter* v. *Wilson*, 609 P.2d 1278, 1281 (Okla. 1980). Thus, the future prospect of repeated contempt prosecutions against respondent is limited in time by his children's attainment of majority. Similarly, the collateral consequences of the contempt conviction upon the issues of custody and visitation will also cease to exist upon the majority of respondent's children.

The state court record does not reveal the birthdates of respondent's children. The record merely reflects that the children were aged fifteen and thirteen at the time the divorce petition was filed on May 28, 1982. At a minimum then, the older child has already attained majority, while the younger child is anywhere from sixteen and a half to seventeen and a half years of age.

Given the mechanics of the appellate process in this Court on certiorari, it is extraordinarily unlikely that this case could be argued before the October, 1986 term. Even assuming a relatively speedy grant of certiorari, the briefing cycle could not be completed in time for the case to be argued during the October, 1985 term of Court. *See* Rule 35, Supreme Court Rules. Thus, there is a realistic probability that both of respondent's children will have attained majority by the time this case is argued and decided, thereby mooting the federal constitutional question. In the interest of judicial economy, this Court should not waste its resources and the resources of the parties where the likelihood of mootness exists. Accordingly, certiorari should be denied.

II.

The Question Of Whether The Sixth Amendment Requires The Appointment Of Counsel For Indigent Civil Contempt Defendants Is Not Properly Before This Court.

Petitioner seeks certiorari to have this Court review the question of whether the Sixth Amendment compels the appointment of counsel for an indigent defendant threatened with incarceration in a civil contempt action for non-support.[3] Respondent asserts that this issue is not properly before the Court.

It is true that the Sixth Amendment issue was marginally addressed by the district court, and was presented *by petitioner* to the Court of Appeals. *See* Appendix B to Petition at 10b-11b (district court's discussion limited to analysis of New Mexico Supreme Court case). Respondent, however, expressly conceded for the purposes of his appeal that he possessed no Sixth Amendment right to appointed counsel. Reply Brief of Appellant at 2 n.1. *But see Ridgeway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983). As a result, the Tenth Circuit neither discussed nor ruled upon the Sixth Amendment question petitioner has presented for review. Since the Sixth Amendment question was not fully aired or developed in the Court of Appeals, it is not ripe for review by this Court. *See Hormel* v. *Helvering*, 312 U.S. 552 (1941); *St. Louis DDTC Parents' Assoc.* v. *Mallory*, 767 F.2d 518, 520-21 (8th Cir. 1985).

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[3] Although petitioner failed to include the factor of threatened incarceration in the questions presented for review, respondent assumes that petitioner intended to include that factor since it is the crucial element triggering the right to counsel. *See Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981).

Respondent's concession on the Sixth Amendment issue in the Court of Appeals effectively made the petitioner the prevailing party on this question. Approval of a petition for certiorari brought by a prevailing party would be inconsistent with this Court's settled refusal to entertain appeals by parties who have obtained favorable results in the lower courts. *See, e.g., Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971). Respondent therefore contends that the only question properly before this Court on certiorari is whether the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel for an indigent defendant threatened with incarceration in a civil contempt action for nonsupport.

III.

An Indigent Defendant Threatened With Incarceration In A Civil Contempt Action For Nonsupport Is Entitled To The Appointment Of Counsel Under The Due Process Clause Of The Fourteenth Amendment.

Petitioner also seeks certiorari to challenge the Tenth Circuit's holding that indigent defendants threatened with imprisonment in a civil contempt action for nonsupport enjoy the right to appointed counsel. This right necessarily imposes the concomitant obligation to inform defendants of the availability of appointed counsel if they are indigent. *Walker* v. *McLain*, 768 F.2d at 1185. *See In re Gault*, 387 U.S. 1, 41-42 (1967); *Miranda* v. *Arizona*, 384 U.S. 436, 473 (1966). The resolution of this question must be undertaken in light of this Court's decisions and the decisions of the lower courts concerning the right to counsel.

A. The Decision Of The Tenth Circuit Is In Harmony With The Decisions Of All Other Courts Of Appeals That Have Considered The Question.

Among the inquiries to be made on a petition for certiorari is whether there is a conflict among the circuits on the same matter. Rule 17.1(a), Supreme Court Rules. In addition to the Tenth Circuit, three other Courts of Appeals have considered the indigent's right to appointed counsel in a civil contempt proceeding for nonsupport.[4] *Sevier* v. *Turner*, 742 F.2d 262 (6th Cir. 1984); *Ridgeway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983); *Henkel* v. *Bradsaw*, 483 F.2d 1386 (9th Cir. 1973). Each of these cases have stated a conclusion in harmony with the decision of the Tenth Circuit. Thus, it is not surprising that petitioner has failed to address the inquiry of a conflict among the circuits on the question presented for review.[5]

In *Henkel*, an indigent contemnor who had been denied appointed counsel in a civil nonsupport proceeding brought a civil rights action in which the district court declared

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[4] Petitioner's assertion that "[t]he only authority cited by respondent for extending [the] right to court-appointed counsel to civil cases of this type are two Federal District Court cases arising out of Ohio . . . as well as a later Federal District Court case out of Michigan, . . ." is patently false. Petition at 9. All relevant authority cited herein was presented by respondent to the Tenth Circuit.

[5] Under Rule 17.1(a), Supreme Court Rules, a further consideration is whether the Court of Appeals decision is in conflict with the decision of the state court of last resort. The Tenth Circuit's decision cannot be said to be in conflict with the decision of the Oklahoma Supreme Court, because the Oklahoma Court did not directly address or fully develop the merits of respondent's constitutional claim. *See* Appendix A to Petition.

that the indigent was entitled to appointed counsel if imprisonment might be the result of the contempt proceeding. While the Ninth Circuit reversed on the basis of *Younger* abstention principles, the Court of Appeals nevertheless commented:

> [W]e share the District Court's view that Henkel, absent the representation of counsel, could not be sentenced to jail in the contempt proceedings.
>
> * * *
>
> The state trial judge, now cognizant of *Argersinger*, will most assuredly know that if a lawyer is not appointed for Henkel's representation, Henkel cannot be confined even if found to have been contemptuous.

483 F.2d at 1388-89.

Electing to proceed by habeas corpus, the indigent petitioner in *Ridgeway* successfully argued that he was constitutionally entitled to appointed counsel where imprisonment may result from a civil contempt proceeding for nonsupport. Noting that "[t]he right to counsel turns upon whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil'," the Fifth Circuit concluded that "[i]f . . . imprisonment, by whatever process it is adjudicated, is the possible result of a proceeding, the defendant who is threatened with jail has the right to a lawyer." 720 F.2d at 1413, 1415. Likewise, on habeas corpus in *Sevier*, the Sixth Circuit had no difficulty concluding that "[s]ince Sevier was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding [citations omitted]." 742 F.2d at 267.

In contexts other than nonsupport proceedings, the Courts of Appeals are equally unanimous in concluding that

indigent civil contemnors are constitutionally entitled to appointed counsel when subjected to imprisonment. *See, e.g., United States* v. *Bobart Travel Agency*, 699 F.2d 618 (2d Cir. 1983) (failure to produce records under IRS summons); *United States* v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) (failure to produce records); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973) (refusal to testify before grand jury). *See also In re DiBella*, 518 F.2d 1154 (2d Cir. 1975). These cases are not dissimilar from the civil contempt action for nonsupport in that in each instance the contemnor purportedly has the ability to free himself from imprisonment simply by complying with the court order.[6] There is thus no conflict whatsoever among the circuits on either the question presented for review or on related questions. This unanimity among the circuits militates strongly against the grant of certiorari in this case.[7]

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[6] The indigent defendant in a nonsupport action, however, faces a difficult Gordian Knot. Since compliance with the court order in a nonsupport action involves the payment of money, the indigent defendant's ability to free himself from imprisonment is merely illusory. *Walker* v. *McLain*, 768 F.2d at 1184; *Ridgeway* v. *Baker*, 720 F.2d at 1413-14; *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11 (Iowa 1982).

[7] The federal district courts are likewise unanimous in finding a due process right to appointed counsel for the indigent defendant in a civil contempt action for nonsupport *Johnson* v. *Zurz*, 596 F.Supp. 39 (N.D. Ohio 1984); *Lake* v. *Speziale*, 580 F.Supp. 1318 (D. Conn. 1984); *Cobb* v. *Green*, 574 F.Supp. 256 (W.D. Mich. 1983); *Mastin* v. *Fellerhoff*, 526 F.Supp. 969 (S.D. Ohio 1981); *Young* v. *Whitworth*, 522 F.Supp. 759 (S.D. Ohio 1981).

B. The Decision Of The Tenth Circuit Is Consistent With The Applicable Decisions Of The United States Supreme Court.

In the landmark decision of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court held that the Sixth Amendment's guarantee of the assistance of counsel was applicable to the states as a matter of due process of law, and accordingly concluded that the indigent felony defendant was entitled to appointed counsel. This rule was extended to encompass all criminal prosecutions wherein the accused is subjected to imprisonment in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). The cutting edge for this expanded right to counsel was whether "an accused is deprived of his liberty," and not whether the offense be characterized as petty or serious. 407 U.S. at 32.

While *Gideon* and *Argersinger* dealt primarily with the Sixth Amendment, this Court has also had occasion to address the question of whether the due process concept of fundamental fairness required the appointment of counsel for an indigent child in a juvenile delinquency proceeding. *In re Gault*, 387 U.S. 1 (1967). In the historically *civil* delinquency proceeding, this Court eschewed the civil label of convenience and held that:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*, the child and his parents must be notified . . . [that] if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. at 41 [Emphasis supplied].

In terms of the indigent defendant's right to appointed counsel, then, these cases reflect the Court's increasing concern and emphasis on the outcome of a proceeding, viz., loss of physical liberty, rather than on the label attached to it as civil or criminal. Wherever the outcome results in a loss of physical liberty, the trend is to impose the right to counsel. *See Vitek* v. *Jones*, 445 U.S. 480, 496-97 (1980) (plurality opinion).

This Court's emphasis on the outcome of a proceeding in defining the right to counsel has most recently been reiterated in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981). In *Lassiter*, this Court was called upon to determine whether the Due Process Clause compelled the appointment of counsel in a civil action for an indigent who, while threatened with the loss of a fundamental liberty, viz., parental rights, was not directly confronted with the loss of physical liberty. Proceeding from "[t]he preeminent generalization that . . . an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty, . . ." this Court held that when personal freedom is not at stake the right to counsel must be determined on a case-by-case basis employing a two part due process balancing test. *Lassiter*, 452 U.S. at 25.

This test first involves a balancing of the three elements to be evaluated in deciding what process is due, as outlined in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976).[8]

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[8] These elements are: (1) the private interests at stake; (2) the risk that the procedures employed will lead to error, and the probable value of additional safeguards; and (3) the government's interest, including the fiscal and administrative burden the additional safeguards would impose.

Then, the "net weight" of these *Eldridge* factors must be set "in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter*, 452 U.S. at 27.

In adopting this case-by-case balancing test, however, this Court did not retreat from, but rather reinforced, its emphasis on the loss of physical liberty in defining the right to counsel:

> [I]t is the *defendant's interest in personal freedom*, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel. . . .

Lassiter, 452 U.S. at 25 [Emphasis supplied]. Clearly then, when personal freedom hangs in the balance, the *Lassiter* presumption against the appointment of counsel is inapplicable, irrespective of the civil nature of the nonsupport contempt proceeding.[9] *Walker* v. *McLain*, 768 F.2d at 1183 n.1.

Looking to the *Eldridge* factors in the context of the civil contempt proceeding for nonsupport, there is no dispute that the government possesses strong interests in seeing that minor children are supported and in preserving the enforceability of its judicial decrees. Significantly, however, "[t]hese interests will not be hindered by the re-

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[9] Respondent had argued in the Court of Appeals that where unfettered personal freedom was at stake, a court need not employ the *Eldridge* factors in evaluating the right to counsel, because the right was absolute. *See Lake* v. *Speziale*, 580 F.Supp. at 1339; *Mastin* v. *Fellerhoff*, 526 F. Supp. at 973. The Tenth Circuit disagreed, and held that the *Eldridge* factors should be applied as in any other claim to due process of law. *Walker* v. *McLain*, 768 F.2d at 1183 n.1.

quirement [of appointed counsel]." *Young* v. *Whitworth*, 522 F.Supp. at 763. *Accord*, *Walker* v. *McLain*, 768 F.2d at 1184. Thus, only the government's fiscal interest is implicated in the *Eldridge* equation.

Petitioner asserts that the risk of error in a nonsupport proceeding is low because such a proceeding "is normally a simple bookkeeping matter. . . ." Petition at 14. Such an assertion, however, presents an unduly simplistic view of whether the failure to pay support was wilful. To be sure, wilfulness in the context of a nonsupport proceeding is a legal term of art — it does not possess the same meaning as its common usage in the English language. The factual and legal issues which permeate virtually every nonsupport proceeding involving an indigent defendant are clearly beyond the ken of the indigent unrepresented layman, who is often uneducated or illiterate. Accordingly, the Tenth Circuit correctly concluded that "[t]he issues in a proceeding for wilful nonsupport are not so straightforward that counsel will not be of assistance in insuring the accuracy and fairness of the proceeding." *Walker* v. *McLain*, 768 F.2d at 1184. *Accord*, *Ridgeway* v. *Baker*, 720 F.2d at 1414.

The *Eldridge* risk factor cannot be viewed as a static concept. As a defendant's interest in the outcome of a proceeding increases, the degree of potential for error necessary to trigger the claimed safeguard becomes correspondingly less. What is at stake is the integrity of the fact-finding process. When that process may lead to imprisonment, this Court for more than fifty years has spoken with virtually one voice about the heightened need for counsel to preserve the integrity of that process. *See Powell* v. *Alabama*, 287

U.S. 45, 69 (1932). Thus, when the interest at stake is personal freedom, "even a modest reduction in the potential for error in the deprivation of that interest justifies the imposition of appointed counsel." *Young* v. *Whitworth*, 522 F.Supp. at 763.

The final *Eldridge* factor to be evaluated is the private interest at stake. It is beyond cavil that "[t]he [respondent's] interest in this case is one of the most important protected by our constitution — the interest in personal liberty." *Walker* v. *McLain*, 768 F.2d at 1183. Petitioner, however, seeks to denigrate the indigent contemnor's liberty interest in personal freedom by asserting that respondent enjoyed only conditional liberty, and therefore his situation is akin to the probationer or parolee in a revocation proceeding. *See Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). This argument rests on the oft-quoted cliché that the civil contemnor "has the keys to his own prison" and may avoid incarceration simply by complying with the support order or proving his inability to do so.[10] Appendix B to Petition at 12b. Petitioner's analysis, however, is specious.

As the Court of Appeals correctly concluded, respondent's liberty interest cannot be viewed as conditional, for "[i]f [respondent] is truly indigent, his liberty interest is

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[10] It is of no moment that the *pro se* indigent may attempt to prove at trial that his failure to pay support was not wilful, and thus avoid incarceration. One's *present* ability to afford counsel may bear little relationship to one's *past* ability to make support payments, which is the factual inquiry at the contempt hearing. *See Cobb* v. *Green*, 574 F.Supp. at 262. Moreover, as noted in the discussion of the *Eldridge* risk factor, *supra*, the integrity of the fact-finding process is impugned in the absence of counsel.

no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison door if he cannot afford the price." *Walker* v. *McLain*, 768 F.2d at 1184. *Accord, Ridgeway* v. *Baker*, 720 F.2d at 1413-14; *McNabb* v. *Osmundson*, 315 N.W.2d at 9.

Petitioner's reliance on *Gagnon* and *Morrissey* to confer no more than conditional liberty upon the respondent is likewise flawed in that the posture of the civil contemnor is distinctly different from that of the probationer and parolee. Both the probationer and parolee have had judgment and sentence imposed. Thus, unlike respondent, they have already had a trial at which *they enjoyed the assistance of counsel to preserve the integrity of the fact-finding process.*[11]

Clearly, one in respondent's position enjoys "the absolute liberty to which every citizen is entitled, . . ." *Gagnon* v. *Scarpelli*, 411 U.S. at 781. Giving respondent's liberty interest in personal freedom the "extreme weight" it is due radically alters the *Eldridge* equation employed by the district court and argued by petitioner. *Young* v. *Whitworth*, 552 F.Supp. at 763. Indeed, in balancing the *Eldridge* factors, the Tenth Circuit properly concluded that:

> While the state does have an interest in minimizing the cost of [nonsupport] proceedings, this interest in

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[11] *Gagnon* and *Morrissey* are also distinguishable in that revocation proceedings are historically informal with an eye toward rehabilitation of the offender. *See Ridgeway* v. *Baker*, 720 F.2d at 1413 n.4. On the other hand, a civil contempt proceeding is cloaked with many of the formalities of a criminal prosecution. *See* 21 O.S. 1981 §1981. *See also Whillock* v. *Whillock*, 550 P.2d 558 (Okla. 1976) (proof by clear and convincing evidence required).

> monetary savings cannot outweigh the strong private interest of the [respondent] and the substantial procedural fairness achieved by providing a lawyer for the indigent defendant in a civil contempt proceeding [citations omitted].

768 F.2d at 1184.

It is thus evident that the Tenth Circuit evaluated the *Eldridge* factors in a fashion entirely consistent with the decisions of this Court regarding the right to counsel, beginning with *Powell* and culminating in *Lassiter*. Certiorari, therefore, should be denied. *See* Rule 17.1(c), Supreme Court Rules.

IV.

The Questions Of Whether Respondent Was Indigent And Whether His Failure To Pay Support Was Contemptuous Are Not Material To The Determination Of Certiorari.

Although not specifically raised as questions for review, petitioner has injected the issues of respondent's indigency and the factual merits of the state court contempt hearings. In so doing, petitioner has not made a fair presentation of the facts. These issues serve only to obfuscate the proper inquiries as to whether certiorari should be granted. *See* Rule 17, Supreme Court Rules. Indeed, the district court properly noted that these issues were outside the scope of a federal court's inquiry on habeas corpus:

> It is not this court's function to determine whether the original support order should be modified or to determine whether [respondent] is indigent, or to determine [respondent's] present ability to comply with the support order . . . This court's function in this action is solely to determine whether [respondent]

> is being held in custody in violation of the Constitution, laws or treaties of the United States.

Appendix B to Petition at 14b. It is not the merits of the state court contempt actions that respondent challenged; rather, he attacked the process by which those issues were adjudicated. Certainly, a court does not consider one's guilt or innocence in appointing counsel in a criminal prosecution.

Similarly, the issue of respondent's indigency cannot now be considered in deciding whether to grant certiorari. Respondent was not denied counsel for lack of proof of his indigency. Rather, the state court judge did not advise the respondent of any right to appointed counsel based upon that court's view that no such right existed in the law. *See* Appendix B to Petition at 4b. Thus, even if respondent had affirmatively demonstrated his inability to afford counsel, none would have been appointed. Having imprisoned Mr. Walker for ninety days, "the state cannot now be heard to assert an entirely different reason for denying [Walker] counsel." *Ridgeway* v. *Baker*, 720 F.2d at 1412.

Moreover, respondent claimed not only a right to appointed counsel, but also the right to be advised of the availability of appointed counsel, if indigent. This latter right exists quite independently of respondent's claimed indigency. The state trial judge obviously "could not know whether [Mr. Walker] was indigent unless [he] inquired about the matter." *Sevier* v. *Turner*, 742 F.2d at 266 n.4. It is undisputed that the state court judge made no inquiry into respondent's indigency vis-a-vis his ability to employ counsel.

The Court of Appeals, therefore, properly rejected petitioner's argument that the case should be remanded for a determination of respondent's indigency. *Walker* v. *McLain*, 768 F.2d at 1185. *See Miranda* v. *Arizona*, 384 U.S. at 473 n.43. This Court should likewise reject this argument in deciding whether to grant certiorari.

CONCLUSION

The petition presents no issue warranting review by this Court. Respondent, therefore, respectfully prays that this Court deny the petition for certiorari.

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December, 1985

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the Respondent's Brief in Opposition were mailed this ..... day of December, 1985, postage prepaid, to: S. Paul Richards, Assistant District Attorney, Pottawatomie County Courthouse, Shawnee, Oklahoma 74801.

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Steven A. Novick